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No.

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES HOGBERG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JAMES HOGBERG,

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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner James Hogberg prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Judgment Below

The unpublished order of Court of Appeals is reprinted as an Appendix to this petition, *infra.*

Jurisdiction

The judgment of the Court of Appeals was entered on March 18, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Rule 22 (2) of the rules of this Court.

Questions Presented

Whether *Hampton* v. *United States,* 425 U.S. 484, should be modified to permit defendants to raise an estoppel against government prosecution where such prosecution is predicated upon the crimes of federal agents.

Statute Involved

21 U.S.C. Sec. 841 (a) (1) provides in relevant part:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to . . . distribute . . . a controlled substance

Statement of the Case

Petitioner, James Hogberg, was charged in three counts with distributing cocaine in violation of 18 U.S.C. Sec. 841 (a)(1). On conviction on each of the counts he was sentenced to six months in a work release program, fined $2,000, placed on a four year special parole term and five years probation.

Statement of Facts

(Numerical references, e.g. "Tr. 55" are to the Transcript of Proceedings. Unsupported references are condensed from the appellate court's statement of facts. See appendix hereto.)

The Government's Evidence

Petitioner did not dispute the government's evidence in trial. It revealed that one William Finley, acting as an informant for the Drug enforcement administration (DEA) introduced DEA Agent Frank Tucci to petitioner, a broker's clerk employed upon the floor of the Chicago Board Options Exchange. The DEA was conducting an investigation of cocaine sales at the exchange.

At the introduction on June 29, 1978, at the Exchange, Finley told Hogberg that Tucci wanted to buy cocaine. Hogberg replied he had none, but expected to get some in a week. At the next meeting of Tucci, Finley and Hogberg in a restaurant near the exchange on July 7, Hogberg told Tucci he could get him an ounce and they settled on a price of $2150. Hogberg took the money from Tucci, left, and returned in about an hour with the cocaine.

Two subsequent transactions from which Finley was absent, occurred on July 11 and August 11. Prior to each, Hogberg called Tucci and told him cocaine was available. Both transactions followed the pattern of the first, Tucci giving Hogberg the money, Hogberg leaving and returning with the drug. Observations during the last transaction disclosed Hogberg going to the residence of one Morigi, who, in Tucci's opinion (Tr. 93) was the source of the cocaine which Tucci acquired.

Cross examination of DEA Agent Tucci developed the following further circumstances:

It was and remained Tucci's view that to get the drug, Hogberg visited a third person who would not provide the drug until Hogberg paid him the money supplied by Tucci (Tr. 152). Tucci viewed the transactions as arrangements whereby Hogberg acted as one who bought cocaine on behalf of Tucci, delivering money to a seller and returning the drug to Tucci, the buyer (Tr. 155).

After the August 10 transaction, upon Tucci's learning of Morigi's probable identity as the person from whom Hogberg got the drugs, Finley conceded to Tucci that he knew "of" Morigi, but denied he had ever had drug dealings with him (Tr. 93-94).

Tucci then called Morigi, offering to buy cocaine from Morigi by telling him he was a friend of Finley. Whereupon Morigi immediately agreed to a sale. Later Tucci met Morigi and at that time Morigi, in refusing to sell to Tucci, told Tucci that he had "no idea" why Finley had supplied Tucci with his number to call concerning a sale of drugs (Tr. 111-112). But initially Morigi offered to sell him cocaine after Tucci had ". . . used the magic name 'Finley'" (Tr. 116). Tucci testified that he would be unable to deny that Finley was dealing in cocaine through Morigi in the summer of 1978 (Tr. 95) and that while he had formed an opinion that Finley was not a cocaine dealer, it was "very possible" that he was wrong in that opinion (Tr. 108).

The Defendant's Evidence

Hogberg agreed to the essential accuracy of Agent Tucci's testimony concerning the three transactions (Tr. 251, 254, 256, 257).

Hogberg further testified that Finley telephoned him prior to the first transaction, and asked Hogberg to step between him, Finley, and Finley's customer, Tucci, in a cocaine sale. Finley explained that because Tucci was his friend, he could not bargain for the price he wanted, $2200 (Tr. 248). Finley also asked Hogberg to hold Tucci off because he could not supply him immediately. Hogberg agreed.

On July 7, 1978 Finley arranged a meeting of the three. Hogberg and Tucci "bargained", agreeing on $2150. When Tucci absented himself to count out his money, Finley told Hogberg to keep anything over $2000 (although Hogberg had expected to be given some cocaine) and told Hogberg to pick it up from Paul Morigi, a person known to both

of them (Tr. 250-252). Hogberg took the money provided by Tucci and picked the cocaine up as Finley directed, retaining $150 per Finley's instructions (Tr. 254).

Finley called Hogberg from Florida before the second transaction, and asked Hogberg to repeat the performance, which Hogberg did (Tr. 255-256).

On Finley's third call, Hogberg objected because he was starting to feel like a delivery boy, but consented and performed as requested (Tr. 257).

Hogberg denied any ownership interest in the cocaine. Finley and not he had an interest in it. Finley was known as someone who could supply whatever anyone would want in drugs (Tr. 260).

Hogberg testified that his connection with cocaine was casual and social—that when the young people working around the Options Exchange bought drugs, they would "chip in" and would divide up drugs, much as a group would chip in and divide up a pizza, and that he had acquired cocaine this way many times (Tr. 245). He and Finley had shared cocaine in the past (Tr. 263). He denied dealing in cocaine—he bought it—and then in $25 and $50 amounts (Tr. 264, 267-268).

Government's Rebuttal Evidence

Although Finley was available to the government, the government did not call him to rebut Hogberg's testimony concerning Finley's role in the transactions.

REASONS FOR GRANTING THE WRIT

Hampton v. United States, 425 U.S. 484, should be modified to the extent of permitting defendants to raise an estoppel against government prosecution where such prosecution is predicated upon the crimes of federal agents.

In seeking certiorari here, we concede that granting the writ would imply this Court's retreat from the position taken by the Court in *Hampton* v. *United States,* 425 U.S. 484. *Hampton* (Tr. 490) espouses the principle that the defense of entrapment is the *only* defense available when the acts of government agents are not resisted by a defendant, and then, if and only if the defendant lacked predisposition to commit the offense.

Here, the defendant was predisposed to violate various laws relating to cocaine. He testified to a history of using cocaine socially, to acquiring it in small quantities with friends for division among them, and the like. Under *Hampton* he became therefore, a fit subject upon whose "investigation" the government could properly lavish $7,200 in actual expenditure—$800 to its informant, Finley, and $6,400 for cocaine supplied by Finley. How much of the latter figure also went into Finley's pocket we are left to conjecture. The government was content with adverse inferences. It did not call its agent, Finley, as its witness.

We urge upon the Court that the consequences of *Hampton* merit reconsideration of the doctrines approved of therein. It should be noted that *Hampton* encourages governmental criminality by permitting government to retain the proceeds of its crimes. Distribution of cocaine is equally criminal whether committed by government or by private citizens. Finley's distribution of cocaine to Hogberg should

be considered, we urge, more heinous than Hogberg's re-delivery of the government's own cocaine to Agent Tucci, simply *because* Finley acted as a government agent. The fruit of the government's crime was Hogberg's conviction. The crime was committed to procure his conviction. *Hampton* rules that the appropriate remedy is prosecution of the offending government agents under federal law (Hampton, 490). That is to say, the government agents who were parties to the crime should now prosecute themselves. Retaining the while, of course, the fruits of their offense.

The Court of Appeals for the Seventh Circuit was urged to hold, simply, that the government cannot commit crimes and that the government is not ab[illegible] law. The court's response:

> "We do not view our decision as legitimizing illegal Government activity. Rather, we believe that it is in recognition of the law enforcement interests involved and the need for undercover police work in certain circumstances." (Opinion, Appendix, footnote 8)

In short, the effect of *Hampton* requires a court of the United States to avoid asserting a brace of generalities hitherto assumed to be foundational to our very conception of limitations upon sovereignty. The court's quoted words, given their most generous construction, mean that where the "interests" of law enforcement are involved and where there is a need for undercover police work, then we will not proclaim the sovereign is subject to the law, nor forbidden to commit crimes. The words of the court would not be unbecoming to John Plantagenet.

We suggest that this Court might properly give consideration to the proposition that where a federal prose-

cution is predicated upon the crimes of federal agents in procuring that prosecution, the government should be estopped from pursuing the matter by litigation in the federal courts.

CONCLUSION

For the foregoing reasons we pray the Court to grant certiorari herein.

Respectfully submitted,

FRANK OLIVER

Attorney for Petitioner

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued February 29, 1980

March 18, 1980.

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 79-1889 vs.

JAMES K. HOGBERG,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79 CR 96

John Powers Crowley, *Judge*.

ORDER

I.

Defendant-appellant, James K. Hogberg, appeals from a judgment of conviction for three counts of distribution of cocaine in violation of 18 U.S.C. § 841(a)(1). Hogberg

was sentenced to six months in a work release program, fined $2,000, and placed on a four year special parole term and five years probation.

Each of the three distributions was to Frank Tucci, a special agent for the Drug Enforcement Administration (DEA). Tucci had been introduced to Hogberg by Thomas Finley, a DEA informant. Tucci was investigating the alleged use, sale, and distribution of cocaine at the Chicago Board of Options Exchange (CBOE). As part of this investigation, Tucci secured the aid of Finley as an informant. Finley was an employee at the CBOE and was familiar with various individuals at the CBOE suspected of cocaine distribution.

In the light most favorable to the Government, the evidence demonstrated the following: On June 29, 1978 Finley introduced Tucci to Hogberg and Finley told Hogberg that Tucci was interested in purchasing cocaine. Hogberg stated that he had no cocaine at that time but expected to acquire some within a week.

On July 7, 1978 Tucci and Finley met Hogberg at a restaurant located in the CBOE building. Hogberg told Tucci that he could get an ounce of cocaine for $2,200. Some bartering over the price took place and Hogberg and Tucci finally settled on a price of $2,150 an ounce. Tucci paid Hogberg and Hogberg left the restaurant. Thereafter, Hogberg returned to the restaurant and gave Tucci a key for a locker which was located in that building. Tucci went to the locker and located inside was a white envelope containing approximately one ounce of cocaine.

On July 10, 1978 Hogberg called Tucci and informed him that another ounce of cocaine was available. Tucci indicated that he was interested and a meeting was scheduled for the next day. At the meeting Tucci paid Hogberg $2,150 and received approximately one ounce of cocaine.

The final transaction occurred after Hogberg telephoned Tucci to inform him that cocaine of higher quality was available. A meeting was set for August 11, 1978. Tucci and Hogberg met as planned, Tucci paying Hogberg $2,100. Hogberg accepted the money and took a taxicab to 349 W. Belden.[1] Hogberg went into the building and returned to the waiting cab. Hogberg returned to a bar, met Tucci, and handed over approximately one ounce of cocaine.

Hogberg testified that the details of the transactions as set forth above and described by the Government's witnesses essentially were true. However, Hogberg testified that his role in the transactions was actually quite insignificant. Hogberg stated that before meeting Finley and Tucci on June 29, 1978, Finley called Hogberg and told him that he had a friend who wanted cocaine. Furthermore, Hogberg testified that Finley asked him to step in as the ostensible seller of the cocaine. According to Hogberg, Finley requested this because Finley did not feel that he could charge as high a price to his friend if he sold the cocaine directly. Believing that Finley was "calling the shots," Hogberg acceded to this request.

Hogberg testified that prior to each sale to Tucci, Finley called Hogberg and gave him directions to go to 349 W. Belden and merely pick up cocaine that Finley had arranged to be purchased.

The purpose of Hogberg's testimony was to demonstrate that the conduct of the Government was so outrageous that it amounted to a violation of due process, thus barring his conviction. *Hampton* v. *United States,* 425 U.S. 484

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[1] Hogberg was unaware that the taxicab he entered was being driven by a DEA special agent. Later in the investigation, it was determined that the address was that of Paul Morigi, an alleged distributor of cocaine and an individual under DEA investigation.

(1976); *United States* v. *Duff*, 551 F.2d 187 (7th Cir. 1977). Hogberg proffered several instructions which incorporated his theory of the defense. The district court rejected the instructions, concluding that under the facts of the case the Government's conduct did not violate due process. Hogberg's primary assignment of error is this failure to submit his instructions embodying his theory of the defense.

Hogberg also claims that the district court erred in not giving a missing witness instruction. This argument is based on the Government's failure to call Finley as a witness. The record indicates that Finley was physically available but that neither party called him as a witness.

We reject these contentions and affirm the judgment of the district court.

II.

In *United States* v. *Russell*, 411 U.S. 423 (1973) the Supreme Court explicitly stated that the focus of any entrapment defense was the predisposition of the defendant. In thus holding, the Court eschewed any entrapment defense which looked not toward the defendant's predisposition, but rather the behavior of the Government in the particular case.[2]

However, in often quoted *dictum*, the Court in *Russell* did state that there may be some day when the conduct of law enforcement agents was so outrageous that due process absolutely would bar the Government from invoking the judicial process against a particular defendant. *Id.* at 431-32. The Court did not give any indication as to what

[2] Hogberg did not attempt to raise a defense of entrapment, apparently conceding that he was predisposed to commit the crime.

limits could be imposed upon police activity or attempt to delineate criteria to be utilized in assessing police activity.[3]

In *Hampton* v. *United States*, 425 U.S. 484 (1976), a majority of the Court reaffirmed the *dictum* of *Russell*, but on the facts of that case the Court believed that the police conduct did not violate notions of fundamental fairness implicit in the due process clause. In *Hampton*, the defendant was convicted of the sale of heroin. The sales arose from a discussion between the defendant and a DEA informant. The defendant claimed that the informant supplied him with heroin and also arranged for the sales of the heroin to a DEA agent. This practice of having the Government or its informants supply heroin to a defendant to sell to another Government agent, the defendant contended, was so outrageous that it violated due process. While the members of the Court in *Hampton* split among various rationale, five of the Justices concluded that the process of supplying drugs to a defendant and purchasing the drugs did not violate due process.[4]

[3] The task of grappling with the vague statement set forth in *Russell* was thrust upon the lower federal courts. *See United States* v. *Lue*, 498 F.2d 531 (9th Cir. 1974) (rejecting *Russell* due process argument); *United States* v. *West*, 511 F.2d 1083 (3d Cir. 1975) (invalidating conviction based on *Russell* due process argument). *See also United States* v. *McGrath*, 468 F.2d 1027 (7th Cir. 1972), *vacated and remanded*, 412 U.S. 936 (1973), *reconsidered*, 494 F.2d 562 (7th Cir. 1974) (rejecting *Russell* due process argument on remand).

[4] The Chief Justice and Justices White and Rehnquist adopted an absolute position that a due process argument was never available, concluding that an entrapment defense is the defendant's sole challenge to police conduct. Justices Powell and Blackmun, concurring, stated that they could imagine a different fact situation which might violate due process. They believed, however, that on these facts there was no violation. Thus, five Justices found no due process violation. Justices Brennan, Stewart, Marshall accepted a due process analysis but also stated that they would adopt an objective approach to the entrapment defense, and utilizing that approach vacate the conviction.

In *United States* v. *Duff*, 551 F.2d 187 (7th Cir. 1977) we had an opportunity to discuss a Hampton type defense.[5] *Duff* involved a defendant who was introduced to an undercover DEA agent by a Government informant. The testimony indicated two sales of cocaine to the agent by the defendant. At trial the defendant testified that the drugs were furnished by the informant and that the defendant was merely pretending to be the supplier. As in the present case, the defendant requested an instruction on the intolerable degree of police participation. However, we rejected this argument and held that no such defense was available.

Hogberg claims that he was not the actual seller of the cocaine but that Finley in fact sold the cocaine, merely using Hogberg as a conduit to obtain a higher price.[6] We see no difference between the present case and *Duff* and thus believe that the conduct of the Government in the present case was not so outrageous as to violate due

[5] The Hampton decision, and the splits it engendered among the Court's members, has been the subject of much lower federal court discussion. Courts overwhelmingly have focused on Justice Powell's concurring opinion in *Hampton* and held that while there may be some cases so outrageous that a violation of due process occurs, such a contention rarely will succeed. *Hampton*, 425 U.S. at 495 n.7 (Powell, J., concurring). *See United States* v. *Corcione*, 592 F.2d 111 (2d Cir. 1979); *United States* v. *Prairie*, 572 F.2d 1316 (9th Cir. 1978); *United States* v. *Johnson*, 565 F.2d 179 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978); *United States* v. *Leja*, 563 F.2d 244 (6th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978); *United States* v. *Graves*, 556 F.2d 1319 (5th Cir. 1977), *reh'g en banc denied*, 562 F.2d 1257, *cert. denied*, 435 U.S. 923 (1978) (all rejecting due process argument). Likewise, we have rejected a due process challenge, *United States* v. *Batchelder*, 581 F.2d 626 (7th Cir. 1978). *But see United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978) (invalidating conviction on due process grounds).

[6] There was evidence that for his participation in the sales of cocaine, Hogberg received some money.

process.[7] Based on our decision in *Duff* we reject Hogberg's contention.[8]

[7] In this brief, Hogberg points to several other actions taken by the Government which indicate outrageous Government behavior. Specifically, Hogberg claims that the Government was interested in media exposure by conducting the arrest and investigation in this case. Also, Hogberg contends that Tucci attempted to lure him to the CBOE by offering him marijuana in order to arrest Hogberg in the presence of the media.

Hogberg's complaint is essentially that the Government had an improper motive in bringing this prosecution. A prosecution is presumed to be undertaken in good faith and in a nondiscriminatory fashion. *United States* v. *Falk*, 479 F.2d 616 (7th Cir. 1973) (en banc); *United States* v. *Heilman*, (7th Cir., No. 79-1301, Feb. 8, 1980 at 10-11). Hogberg has not demonstrated that others similarly situated have not been prosecuted nor that the Government's decision to prosecute was based on race, religion, or the exercise of a constitutional right. *United States* v. *Stout*, 601 F.2d 325 (7th Cir. 1979), *cert. denied*, Dec. 12, 1979.

Hogberg's final argument on Government overinvolvement is Tucci's attempt to deal directly with Hogberg's cocaine source—Morigi. This argument is frivolous. The purpose of undercover work in drug investigations often is to apprehend the larger dealers in the scheme. Thus, Tucci was acting properly in attempting to contact Morigi.

Our decision that the facts of the case present no due process violation makes it unnecessary for us to determine if this issue is more appropriately disposed of by the trial court or by the jury.

We do note that most decisions consider the issue as one of law for the judge, since the focus of the analysis is not whether the defendant did the prohibited act, but rather if the Government should be barred as a matter of law from proceeding with the case. *United States* v. *Hampton*, 425 U.S. 484, 495 (1976) (Brennan, J., dissenting); *United States* v. *Graves*, 556 F.2d 1319 (5th Cir. 1977); *United States* v. *Quinn*, 543 F.2d 640 (8th Cir. 1976).

[8] At oral argument, counsel for Hogberg contended that this court should rule that the Government cannot commit crimes and that the Government is not above the law. We do not view our decision as legitimizing illegal Government activity. Rather, we believe that it is in recognition of the law enforcement interests involved and the need for undercover police work in certain circumstances.

III.

Hogberg contends that it was error for the district court not to give an instruction on the failure of the Government to call Finley as a witness. Specifically, Hogberg argues that the jury should have been instructed that:

> The failure of the Government to call William Finley as a witness creates the presumption that his testimony would be unfavorable to the Government.

Under the circumstances of the case, such an instruction was not required. In *United States* v. *Mahone,* 537 F.2d 922 (7th Cir.), *cert. denied,* 429 U.S. 1025 (1976), we discussed the necessity for such an instruction. Mahone set forth a threshold requirement that the absent witness be peculiarly within the other party's power to produce. This requirement was fulfilled even if the witness was physically available to both parties. This was in recognition of the fact that even if physically available, the special relationship between the witness and the party makes his testimony likely to be biased for one party.

> [W]here there is likelihood of bias on the part of the person not called as a witness in favor of one party, "that person is not, in a true sense, 'equally available' to both parties."

Yumich v. *Cotter,* 452 F.2d 59, 64 (7th Cir. 1971). In the present case, Finley was physically available to both parties. In fact, the record reveals that Finley was present at trial but was not called by Hogberg as a witness.

Assuming *arguendo* that a special relationship existed between Finley and the Government because of Finley's status as an informant, *Mahone* sets forth a second requirement which must be fulfilled in order for a party to receive the missing witness instruction. The unpresented evidence must elucidate the issues in the case. That is, the unpresented testimony cannot be irrelevant nor can it be cumulative.

Assuming *arguendo* that Finley would have testified that he utilized Hogberg as a conduit for the transactions, Finley's testimony would not have been relevant to any issue in the case. In our discussion above, we assumed that Hogberg's testimony was true and held that, as a matter of law, the conduct described did not violate due process. Thus, at best Finley's testimony would have corroborated testimony that, even if true, would have been legally insufficient to bar a conviction.

The judgment of the district court is affirmed.